

# SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR  
3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7647  
[WWW.SWIDLAW.COM](http://WWW.SWIDLAW.COM)

NEW YORK OFFICE  
THE CHRYSLER BUILDING  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174  
TEL. (212) 973-0111  
FAX (212) 891-9598

PATRICK J. DONOVAN  
DIRECT DIAL: (202) 424-7857  
FAX: (202) 424-7645

December 16, 2002

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, D.C. 20554

Re: ***Ex Parte***  
CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

In this letter, Cbeyond Communications provides further information for the Commission's consideration in the above-captioned proceeding concerning some ILECs' practice of rejecting CLEC orders for DS-1 UNEs based on "no facilities."

## **ILECs Must Provide NonDiscriminatory Access to Network Elements**

Cbeyond stresses that under Section 251(c)(3) of the Act ILECs have an obligation to provide "nondiscriminatory access to network elements on an unbundled basis."<sup>1</sup> This obligation to provide nondiscriminatory access to network elements is not limited in ways that Verizon and other ILECs ask the Commission to establish. The statute does not provide that an ILEC may discriminate in provision of access to network elements on an unbundled basis when it must engage in construction, or non-routine activities, in order to provide the UNE. On its face, the statute prohibits an ILEC from providing a network element to itself for provision of service to its own customers on terms or in circumstances different than what it provides the network element to CLECs. Therefore, the Commission may and should reject as irrelevant ILECs' attempts to justify its "no facilities" policy based on the fact that in some cases they may need to take some affirmative steps in order to provide nondiscriminatory access to a network element. The Commission should establish that where an ILEC engages in an activity, such as installation of repeater cases, in order to provide a DS-1 loop to its own customers, it must also engage in that activity in order provide the network element to the CLEC. Any other approach is inconsistent with the statute.

---

<sup>1</sup> 47 U.S.C. Section 251(c)(3).

**Routine Activities Supporting the Operation, Maintenance, and Repair of the Network Do Not Justify a “No Facilities” Policy**

As state above, ILECs have an unqualified obligation under the Act to provide nondiscriminatory access to network elements on an unbundled basis. Nonetheless, assuming *arguendo* that ILECs could permissibly discriminate in provision of access to network elements based on the fact that some affirmative steps would be required by the ILEC in order to provide the UNE, Verizon and other ILECs have totally failed to show that any of the steps they complain about are anything other than routine, ordinary activities that they undertake on a daily basis in order to provide service to customers over the existing network.

For example, Verizon attempts to paint various routine activities such as securing access to aerial or underground cable as extraordinary activities that constitute provision of a superior network.<sup>2</sup> Verizon implies that entering a manhole, coordinating with local traffic authorities, and removing water or noxious gases, for example, constitute engaging in substantial construction activity that it is not obligated to perform if necessary to provide a DS-1 UNE. In fact, Verizon performs all of these and other activities as part of normal, routine operation, maintenance, and repair of the existing network. Operation, maintenance, and repair of the network necessarily involves replacement of repeaters, apparatus cases etc. and ILECs do this on virtually a daily basis whenever the need arises. Accordingly, none of these activities may be considered unusual or provision of a superior network because ILECs do them as a matter of course in connection with the existing network. The Commission should determine that these activities as well as other activities such as deployment of technical personnel, truck and equipment rolls, coordination between various units of the ILEC, securing cable pairs, splicing, locating and identifying plant including buried plant, compliance with traffic and other local and state regulations, mounting equipment, testing, ordering equipment, updating of inventory systems, and planning and design work for any of these activities are routine and ordinary in connection with operation of the existing network and do not justify a “no facilities” policy.

Therefore, it is Cbeyond’s view that rearrangement of facilities such as that required for cable throws and cable splicing is performed by the ILEC on a routine, standard interval basis. These types of rearrangements are performed on a daily basis for DSL and DS1 and in fact there is personnel dedicated by the ILEC to perform these routine changes. Similarly, the same ILEC personnel also routinely perform rearrangements, cable splicing, cable throws as well as other types of required conditioning in performing routine maintenance. In these maintenance situations, however, the work is performed in a four hour interval, not the standard installation interval, lending further support of the routine nature of this kind of activity by the ILEC.

In this light, performance of none of the specific tasks that Verizon and other ILECs claim that they are not obligated to perform is excused because some or all of these activities may be involved. Verizon claims it may decline to install: an apparatus or doubler case if this would be necessary to provide a DS-1 loop UNE because this would require it to access either aerial or buried cable, splice into the cable, and install the doubler case; a repeater shelf or rack in the central office because it must engage in planning, install equipment, and run cable to appropriate termination points; building riser cable or drops in order to reach a customer location

---

<sup>2</sup> Letter to Marlene H. Dortch, Secretary from W. Scott Randolph, Verizon, CC Docket No. 01-338, filed October 18, 2002 (“Verizon *Ex Parte*”).

because it must install the cable; multiplexers in the central office or at the customer's location because this involves third party vendors, ordering and installing equipment, cabling to appropriate termination points, testing, and updating of inventory systems.<sup>3</sup>

Verizon performs all of these tasks and the associated activities necessary to accomplish them on a daily basis separate and apart from provision of UNEs to CLECs. It performs them to provide service to its own customers over the existing network, and to operate, maintain, and repair the existing network. Installing a doubler case can be accomplished in a matter of hours. Verizon installs new repeater shelves or racks whenever it deems it necessary to do so in order to provide service over the existing network. This does not involve substantial or unusual work that Verizon should be excused from performing in order to provide DS-1 UNEs to CLECs even if it were lawful to do so. Verizon also provides drops and installs wiring up to the demarcation point as established in accordance with the Commission's rules. Verizon installs multiplexers on a daily basis. Accordingly, the specific tasks that Verizon says it will not do under its "no facilities" policy do not involve engaging in any substantial activity beyond what is routine in connection with the existing telephone network, assuming that this activity could in any event constitute a justification for discriminating in provision of access to network elements on an unbundled basis. The Commission should establish that any activities such as the above that ILECs routinely perform in connection with the operation, maintenance, and repair of the network do not justify a "no facilities" policy.

#### **Extended Interval Activities Do Not Justify a "No Facilities" Policy**

Most of the activities that Verizon and other ILECs claim justify a "no facilities" policy are routinely completed within the standard interval for DS1 UNE loops. This was Cbeyond's experience with SBC's recently initiated, but temporarily suspended, "no facilities" policy. Cbeyond chose to order DS-1 special access capability in order to serve six customers for which SBC declined to provide DS-1 UNEs based on "no facilities." All six of these orders were provisioned with no delay and within the standard interval of the order for special access.

On the other hand, Cbeyond recognizes that it is possible that some activities involved in the routine operation, maintenance, and repair of the network may require longer than the standard interval to complete. For example, in very rare instances it might be the case that the ILEC must add new racks and supplement power in order to install new equipment. Although it may take more time for this type of expansion, this does not make the activity unusual or outside of normal practices. ILECs routinely add new racks and supplement power where appropriate in order to provide service to their customers over the existing network. Accordingly, the only impact of extended interval activities on ILEC obligations to provision DS-1 UNEs should be that ILECs may take longer than the established standard interval to complete them. That these activities may take somewhat longer to accomplish does not make them any less routine and certainly does not provide an excuse for not performing them. Thus, Cbeyond envisions an interval structure to acknowledge a timing differences associated with routine activities. For example, while most activities fall into the routine category, there could be what is classified as Routine – Standard Interval and Routine – Extended Interval (standard interval plus 5 days).

---

<sup>3</sup> Verizon Ex Parte, at 3 – 7.

### **“Greenfield” Installation of Loops May Be Excused For the Present**

Verizon claims that it is not required to install copper pairs in order to provide DS-1 UNEs. Verizon grossly exaggerates the extent of work involved when it installs new copper pairs over an existing loop route. In connection with an existing route, all of the problems associated with installing loops have already been solved, such as securing rights-of-way, and installing conduit, poles etc. In these situations, Verizon should be required to install a new copper pair in order to provide a DS-1 UNE. In fact, Verizon itself characterizes this situation as a replacement of defective cable pairs, *i.e.* this is a repair of the existing network. As stated, Verizon routinely engages in repair of the existing network, including replacement of copper pairs. Therefore, there is no basis for characterizing replacement of copper pairs as provision of a superior network.

However, Verizon’s claim that it needs to engage in more work and extensive design and planning in connection with installation of copper pair over an entirely new route may have an air of plausibility because Verizon presumably has not already addressed and solved rights-of-way and other problems associated with installing a copper pair over an entirely new route. While the unqualified nondiscrimination obligation of Section 251(c)(3) would require ILECs to construct loops as UNEs in these “greenfield” situations, Cbeyond does not now request a determination that ILECs must install new copper pairs in order to provision DS-1 UNEs to CLECs in these circumstances.

### **ILECs Must Perform Activities Necessary to Support Normal Growth and Changes in Patterns of Demand**

The Commission should determine that activities that are necessary to support normal growth or demand for services, or expected changes in the pattern of demand for services, do not constitute unusual or substantial activity or provision of a superior network that could justify a “no facilities” policy, assuming that the statute otherwise permitted discrimination on this basis, which it does not. It does not take remarkable foresight to know that there is increasing demand for bandwidth and for broadband loops. ILECs and CLECs are increasingly seeking to provide broadband services to customers. Therefore, it can reasonably be expected that ILECs will be engaging in a changing patterns of activities, such as installation of more repeaters and the cases necessary to house them than previously, in order to meet the demand for broadband services from their own customers and CLECs. In fact, ILEC/CLEC interconnection agreements require CLECs to forecast and to report to ILECs their demand for UNEs. ILECs know that they will be called upon to provide DS-1 loop UNEs to CLECs with increasing frequency and they should be required to engage in activities and network modifications necessary to meet that demand. Again, ILECs as a matter of course engage in all of the activities necessary to provide the increasing demand for DS-1 broadband loop capability to their own customers over the existing network. It is not, therefore, an unusual or substantial activity for them to take the same steps in order to provide these facilities to CLECs.

Accordingly, the Commission should determine that ILECs must provide DS-1 loop UNEs to CLECs in all the circumstances as described above.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pat', with a long, sweeping horizontal line extending to the right.

Patrick J. Donovan  
Counsel for Cbeyond Communications

Julia O. Strow  
Vice President Regulatory  
& Legislative Affairs  
Cbeyond Communications  
320 Interstate North Parkway, SE Suite 300  
Atlanta, GA 30339  
(678) 424-2429 (Telephone)  
(678) 424-2500 (Facsimile)

cc: Christopher Libertelli  
Matthew Brill  
Jordan Goldstein  
Dan Gonzalez  
William Maher  
Jeffrey Carlisle  
Carol Matthey  
Scott Bergmann  
Jessica Rosenworcel  
Thomas Navin  
Robert Tanner  
Jeremy Miller  
Julie Veach  
Daniel Shiman

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|   |   |                      |
|---|---|----------------------|
| In the Matter of                            | ) |                      |
|   | ) |                      |
| Review of the Section 251 Unbundling        | ) |                      |
| Obligations of Incumbent Local Exchange     | ) | CC Docket No. 01-338 |
| Carriers                                    | ) |                      |
|   | ) |                      |
| Implementation of the Local Competition     | ) |                      |
| Provisions of the Telecommunications Act of | ) | CC Docket No. 96-98  |
| 1996  | ) |                      |
|   | ) |                      |
|   | ) | CC Docket No. 98-147 |
| Deployment of Wireline Services Offering    | ) |                      |
| Advanced Telecommunications Capability      | ) |                      |

**DECLARATION OF RICHARD BATELAAN, PE**

1. My name is Richard Batelaan, PE. My business address is 320 Interstate North Parkway, Suite 300, Atlanta, Georgia, 30339.
2. I am employed as Vice President—Operations by Cbeyond Communications, LLC (“Cbeyond”). I have previously held positions with BellSouth Telecommunications and Cisco Systems. I worked at BellSouth from 1987 to 1999 and my last position within BellSouth was Vice President of Operations and Chief Operations Officer (COO) for BellSouth.net. I have held a number of positions within the BellSouth family of companies including BellSouth Telecommunications Outside Plant Engineering and Central Office Installation and Growth Supervisor, BellSouth Business Systems Director of Operations for the deployment of Frame Relay and ATM services, and BellSouth.net Director of Network Operations, Director of Engineering, and VP Operations (COO).

3. Cbeyond is a facilities-based Broadband Applications Services Provider (BASP), focusing on "bridging the digital divide", using Internet Protocol (IP) architecture to bring all the communication services that a small business needs at affordable prices typically only previously available to large enterprises. Cbeyond provides an integrated product of local, long distance, Internet access and Internet-based applications such as Unified Messaging, Email, E-Commerce and Web Hosting. The business strategy is to facilitate the movement of business processes via Internet access, making possible electronic communication, collaboration and e-commerce opportunities that will drive the customer's competitive strength and efficiency. Cbeyond uses an integrated IP-based architecture and delivers converged voice, data and integrated network applications over a single platform with seamless integration and delivery.

#### **OVERVIEW AND PURPOSE OF THE DECLARATION**

4. The purpose of this Declaration is to provide supplemental information for the record regarding non-discriminatory access to unbundled network elements, specifically access to unbundled DS1 loops and the circumstances under which an ILEC must provide the necessary conditioning as well as the circumstances under which an ILEC may be relieved of their UNE obligation based on the lack of available facilities.
5. Cbeyond has supported a rule on this matter that would only relieve the ILEC of its obligations in those cases where no physical plant previously exists. Said differently, the ILEC would be required to provision unbundled DS1 loops for CLECs in the same manner as it routinely provides facilities to itself and its retail customers. Based on my experience with the ILEC provision of service to itself for its retail customers and the

provision of unbundled DS1 loops for CLECs, approximately 98 to 99% of all facilities would fall into the category of routinely provided. Only a very small percentage would constitute the “greenfield” situations where no physical plant exists and the ILEC relieved of its obligation.

6. First, it is important to note that Cbeyond provides service to small business customers located in Tier 1 markets. At this time Cbeyond is operational in three cities – Atlanta, Dallas and Denver. Our acquired customer base since becoming operational in early 2001 consists of more than 4,400 very small entrepreneurial businesses that prior to Cbeyond service were served with anywhere from three to twenty five analog lines. Because of this, it is expected that when Cbeyond wins the customer that some degree of conditioning will be required to provide a DS1 capable loop.
7. Since entering the markets in Atlanta, Dallas and Denver, Cbeyond has with limited exceptions, not experienced significant issues with the delivery and provisioning of unbundled DS1 loops in any of its market areas.
8. The first exception to this occurred in the Dallas market when SBC abruptly changed its practice as to what activities they would and would not perform in the provision of DS1 loops. This abrupt change in practice resulted in an increase of order rejects due to no facilities (commonly referred to as an order in “CF” status in SBC) from a historic trend of 0% to 1.5% to reject rates in October and November of 15% to 22%. In early December and as a result of an interim settlement agreement in Texas, SBC reinstated its practice in place prior to October.
9. The other limited exception is in our Denver market where Cbeyond does experience a higher incidence of delays due to “no facilities”. The stark difference, however, with



Qwest in the Denver market, as compared to what we experienced in Dallas during October and November and what we understand to be the experience in Verizon territories, is that the unbundled DS1 loops initially rejected by Qwest due to no facilities, do ultimately and routinely get provisioned and delivered to Cbeyond as an unbundled DS1 loop. In no case to date has Cbeyond ever had to enter into any type of special construction activity to get a loop provisioned as a UNE or as special access in the situations where special access was ordered when the ILEC would not provision the facility as a UNE.

10. My experience is also that 98% of Cbeyond's orders should fall into the category of work that is routinely performed by the ILEC in the normal course of maintaining its network and providing service to its customers. However, my experience has also indicated that perhaps there are timing issues that may need to be taken into consideration when addressing this issue and that the ILECs may not be inclined to provision facilities to which we are entitled because they would then be subjected to penalties due to missing their performance metrics. Thus, it would seem reasonable that a final resolution in this matter should provide some remedy to this disincentive.
11. Based on my knowledge of what is provisioned by the ILEC on a routine basis, it would seem that there should be two categories of what constitutes routine activity. These two categories are Routine – Standard Interval and Routine – Extended Interval. It is my belief that roughly 90% of the routinely provisioned orders would fall into the standard interval category and the remaining 10% would fall into the extended interval category.
12. By way of example the following activities would generally be included in Routine – Standard Interval: rearrangement of facilities (e.g. cable splicing, cable throws, etc);

removing load coils; adding repeater cards; adding doublers; adding multiplexer cards; removing bridge taps; adding range extenders; adding tie cables; adding line drops; adding apparatus cases; and adding doubler cases. Items that might fall into the Routine – Extended Interval (standard ILEC interval plus five days) would be: installing racks; adding multiplexing equipment; adding new remote terminals; and DACS additions. The list for each above is in no way intended to be comprehensive but rather to give concrete examples of what types of routine activities would fall into each category.

13. This concludes my Declaration.

Executed this 16th day of December, 2002

A handwritten signature in black ink, appearing to read "Richard Batelaan", written over a horizontal line.

Richard Batelaan, PE